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Before the
FEDERAL COMMUNICATIONS COMMISSION RECEIVED

Washington, D.C. 20554

SEP 12 1994

In the Matter of)
)
Amendment of Sec. 73.202(b))
Table of Allotments,)
FM Broadcast Stations)
(Garberville and Hydesville,)
California))

MM Docket No. 94-61

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To: Acting Chief,
Allocations Branch, Mass Media Bureau

REPLY BY REDWOOD COMMUNITY RADIO, INC.

Redwood Community Radio, Inc., licensee of noncommercial, educational broadcast station KMUD (FM), Garberville, California ("Redwood"), by its counsel, here submits its Reply to Comments of Petitioner, proposing amendment of the FM Table of Allotments, replacing Channel 279C1 at Garberville with Channel 279C1 at Hydesville, California. In reply, the following is submitted:

1. The Petitioner Has Abandoned His Proposal.

Petitioner Brett E. Miller submitted Comments on August 26. According to the Comments, later studies determined that the selected new site creates a short-spacing with KXGO (FM), Arcata, CA. So, instead of proposing the lateral migration of Channel 279C1 (103.7 MHz), from Garberville to Hydesville, the Petitioner now urges that the community of license be changed and that the allocated channel be modified, from 279C1 to 231C1 (94.1 MHz), and that KWEO (FM)'s permit be modified to specify the new channel.

There is no showing that Channel 231C1 is mutually exclusive with Petitioner's current Channel 279C1, and patently it is not.

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That is a pre-requisite to modifications that are sought, as here, without affording other interested parties an opportunity to file competing expressions of interest, Sec. 1.420(i) of the Rules and Regulations. Accordingly, the relief sought cannot be granted in this proceeding and the proposal, in effect, has been abandoned. Phrased in another way, the Petitioner's statement of interest, to proceed in the manner set forth in his Comments, is not a statement of interest pertaining to anything close to the proposal noticed by the Commission, and so is not adequate basis for the proposal to be adopted.

2. Petitioner's New Proposal Faces Insurmountable Legal Obstacles.

The procedure adopted with the new Sec. 1.420(i) grew of the Commission's recognition that, in the past, competitors had been able to block service enhancements by existing licensees, by changes in the Table, even though the competitors would not themselves have any right to file a competing application and displace the incumbent, where the proposed change was mutually exclusive with the existing service. To make this new policy work, the Commission stated clearly,

The procedure is limited to situations in which the new allotment would be mutually exclusive with the existing allotment and will not apply to nonadjacent channel upgrades.

Report and Order in MM Docket No. 88-526, 4 FCC Rcd 4870, at para. 22 (1989).

The policy being furthered is straightforward. If Channel 231C1 can be added at Hydesville, with no conflict to Petitioner,

it serves the public interest to permit it to be added, and opened for new service proposals, from Petitioner or anyone else, so that Petitioner's existing service to Garberville may be preserved and, at the same time, new service to Hydesville may be added. There is no public interest rationale for adding the channel at Hydesville, and permitting Petitioner, and him alone, to occupy it exclusively -- in the process extinguishing an authorized service to Garberville.

In adopting Sec. 1.420(i), the Commission centrally relied on the element of mutual exclusivity with the incumbent's facilities, to explain its approach in relation to the well-established requirement that new authorizations be made by comparative hearing, Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). Because of the requirement of mutual exclusivity, "our change in this order does not significantly change the actual opportunities afforded to potential applicants. . . ." (Report and Order, para. 24). It appears to this party, even recognizing that the requirements of Ashbacker have been softened over the years, that the courts would not permit the Commission to entertain applications that add new, free-standing channels to the Table, and then entertain only the application of a proponent seeking to extinguish existing service, to the exclusion of applicants proposing wholly new service.

The proposal -- as modified -- also violates established administrative procedure. This is a notice-and-comment rule making proceeding, undertaken pursuant to the Administrative

Procedure Act, 5 U.S.C. Sec. 553, and the Commission's own statutory charge, see 47 U.S.C. 4(i) and 303(r). The established rules and policies have not accorded the public any notice that this proceeding may involve any channel, other than co-channel or adjacent with petitioner's. The solution now propounded by the Petitioner is beyond the scope of the rule making, and could not be adopted without publication of a new Notice of Proposed Rule Making.¹

3. There are no equities in permitting the eleventh hour substitution of Channel 231C1.

Redwood, in its comments, criticized petitioner's use of a purely nominal proposed site for Hydesville, stating that it "questions whether such a site has been positively identified. . . ." Comments, p. 5. It now turns out that the site not only was not buttoned down, but apparently is unavailable. So, in looking for a substitute site, petitioner was able to locate only one that would be in derogation of the spacing requirements to KXGO (FM). However, petitioner's original engineering, Exhibit E-2, showed in advance that the spacing to KXGO was going to limit any site to some 19.7 kilometers south of Hydesville, and see original

¹ Petitioner's late-arriving intention to utilize Channel 231C1 (94.1 Mhz), well might be of unusual interest to Pacifica Foundation, licensee of KPFA (FM), Berkeley, California (likewise, 94.1 MHz), a station operated since 1949 with grandfathered facilities of 59 kW, and enjoying an established, distant audience, including listeners on the Mendocino County coast. Of course, the Commission's Notice accorded Pacifica no warning of Petitioner's latest plan. The Commission's Rules and the Notice, taken together, would justify any party in assuming that no such channel was "in play" in this proceeding.

Engineering Statement, Section II. Petitioner should have determined that its proposal was practical before proposing it, and there are no equities in permitting wholesale revision of the proposed channel at the stage of Comments.

Moreover, Petitioner's Comments themselves are not especially forthcoming on this score. According to Petitioner, "further engineering studies" revealed the short spacing problem, Comments, p. 2. Not exactly. Rather, the inability to use the initially proposed new site -- for whatever reason -- made the entire original proposal illusory. The consulting engineer, apparently recognizing that the Rules will not permit specification of a non-conflicting channel, offers absolutely no separate or additional justification for the substitution of Channel 231C1.

4. Petitioner has not established sufficient grounds for moving the community of license from Garberville to Hydesville.

In a proceeding such as this, normally the Commission is called upon to compare the gains from the proposed new location with the losses from service extinguishment at the current location. Petitioner's proposed use of Channel 231C1 renders such analysis entirely superfluous. Because Channel 231C1 is not in conflict with petitioner's existing facility at Garberville, it can be added upon a separate, and properly noticed future rule-making, without affecting the existing Garberville allotment in any way. That would be a "win-win" situation for the public interest, preserving existing local service on the one hand; and

adding new local service on the other. (Indeed, if good public interest grounds were found, and the new channel added, Petitioner could apply for it, like anyone else.) There is no way that Petitioner's approach -- resulting in the extinguishment of local service -- can be preferred over the approach mandated by the Commission's rules and policies.

With that said, it still appears to Redwood that the public interest showing here, even were it relevant, would be notably unpersuasive. We have here a classic suburban migration proposal. Yet petitioner has not even attempted the detailed showing that would overcome the presumption against first local service preference in these circumstances, Memorandum Opinion and Order in MM Docket No. 88-526 (Recon. Granted in Part), 5 FCC Rcd. 7095, fn. 14 (1990).

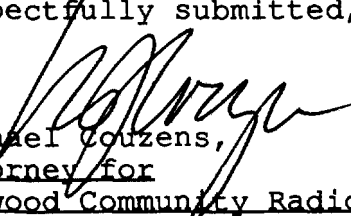
Here the sq. km. area of service would diminish. As with any suburban migration, the overall population in the service area increases substantially, but these are the "empty calories" of supplemental service to a well-served metropolis. Petitioner's comments indicate a net increase of 78,147 persons. But of these, 29,618 would be receiving a **twelfth** channel; 16,943 would get an **eleventh**; 20,859 would enjoy and **eighth, ninth** or **tenth**; 20,338 would obtain a **fifth, sixth** or **seventh**; and none receives a fourth or third, let alone second or first. While Petitioner stresses that only 16 persons in the loss area will end up with fewer than three channels, the Notice in this proceeding correctly states that any such loss is an independent negative factor for

evaluation purposes.

5. Conclusion.

For the reasons stated, Redwood submits that the proposal to amend the Fm Table of Allotments to substitute Channel 279C1 at Hydesville for the same channel at Garberville must be denied, because it has been abandoned by its proponent. The effort of the Petitioner, instead, to substitute Channel 231C1 is beyond the scope of the rule making, not properly noticed, and in violation of the Commission's rules and policies, in a proceeding barring competing expressions of interest. It should be denied, without prejudice to Petitioner re-submitting it as a free-standing proposal, unrelated to the outstanding authorization for KWEO (FM) Garberville, CA.

Respectfully submitted,


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September 12, 1994

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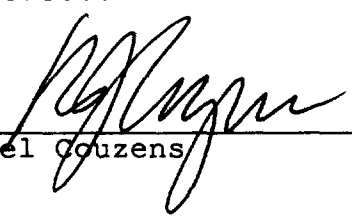
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply by Redwood Community Radio, Inc. was served by First Class Mail, postage pre-paid, on September 12, 1994, to the following:

Brett E. Miller
11608 Blossomwood Ct.
Moorpark, CA.

John A. Karousos
Acting Chief, Allocations Branch
Room No. 8010
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The foregoing is sworn to, under the penalties for perjury provided in the laws of the United States.



Michael Couzens